競爭事務委員會
COMPETITION
COMMISSION

通訊事務管理局
COMMUNICATIONS
AUTHORITY

Guide to the Revised Draft Guidelines Issued under the Competition Ordinance

Introduction

1. On 9 October 2014, the Competition Commission (the "**Commission**"), together with the Communications Authority (the "**CA**"), published six draft guidelines (the "**draft Guidelines**") pursuant to the Competition Ordinance (Cap 619) (the "**Ordinance**") for public comment. Issued at the same time, the *Overview of Draft Guidelines under the Competition Ordinance – 2014* (the "**Overview**") provided details of the Commission's approach to preparing, and the process for submitting feedback on, the draft Guidelines. These followed the release of the Commission's publication, *Getting prepared for the full implementation of the Competition Ordinance*, in May 2014 and an engagement process with a large number of Hong Kong businesses and other stakeholders between May and August 2014.

2. The Commission is pleased to report extensive submissions from a wide spectrum of stakeholders in Hong Kong and overseas during the consultation:

   - 64 submissions were received on the draft Guidelines, covering a total of 640 pages.
   - Submissions were made by 49 separate parties, including parties representing thousands of businesses in Hong Kong.
   - A range of organisations provided comments, including trade associations, chambers of commerce, political parties, public bodies, businesses and law firms and other professional advisory bodies, as well as private individuals.

3. These submissions are available on the Commission's website. In addition, the Commission held meetings with many individuals and organisations both before and during the consultation period to provide information about the Ordinance and give context to the development of the draft Guidelines.

4. The Commission would like to thank all those who participated in the Commission's engagement exercise and consultation. The input received through submissions and meetings has greatly assisted the Commission in identifying areas where amendments, clarifications and further guidance in the draft Guidelines were merited.

5. Following careful consideration of the feedback provided, the Commission has released revised versions of each of the draft Guidelines. These revised draft Guidelines, published on 30 March 2015, are referred to as the "**revised Guidelines**" in this document. The revised Guidelines will be put before the Legislative Council and other appropriate persons for consultation as required by the Ordinance.

6. This guide to the revised Guidelines (the "**Guide**") summarises the Commission's approach to preparing the revised Guidelines and, in particular, how it has addressed key issues raised in the submissions received. The Guide is not intended to give an account of every comment received during the consultation. Amendments to the draft Guidelines which are clear on their face or purely stylistic are not discussed in the Guide.

Overarching approach to preparing the revised Guidelines

7. In the Overview, the Commission set out a number of principles underlying its approach to preparing the draft Guidelines. These principles apply equally to the revised Guidelines.

8. The submissions raised a number of additional points regarding the Commission's general approach to the Guidelines, which are addressed in the paragraphs below.

Status of the Guidelines

9. Certain parties sought clarification as to the legal status of the Guidelines, including the extent to which the Commission would follow the Guidelines.

10. As noted in the Overview, the Guidelines reflect the Commission's interpretation of the Ordinance. Ultimately, it is the Competition Tribunal (the "**Tribunal**") and other Hong Kong courts that will decide the meaning and application of the Ordinance.

11. The Commission will follow the general approach set out in the Guidelines, which will be adapted to the facts and circumstances of a particular matter as may be appropriate. However, there may be circumstances where it modifies the application of the Guidelines, for example where the Tribunal has issued a decision which is inconsistent with the Guidelines. The introductory text in each of the revised Guidelines reflects this position.

Industry and sector neutral

12. Certain submissions requested guidance in relation to a specific industry or sector in the revised Guidelines. As mentioned in the Overview, the legal and economic tests to assess competition concerns have proven around the world to be flexible enough to be applied to a range of economies and industries. As such, the Guidelines are designed to be applicable across sectors. The revised Guidelines therefore do not distinguish between particular sectors, business types or industries.

13. The Commission is aware that there may be sector-specific concerns where guidance would be useful and will endeavour to assist with such concerns to the extent possible. As indicated in the Complaints Guideline, the Commission welcomes queries from the public regarding matters which may be within the scope of the Ordinance, including in relation to sector-specific concerns. In addition, although the examples in the Guidelines are based on a purely hypothetical scenario in a particular industry, they may be applied by analogy to other industries. In the coming months, the Commission intends to issue a range of further guidance (see paragraphs 17 and 18 below) and will continue to engage with specific sector groups as well as Hong Kong businesses generally.

Relevance of overseas precedents

14. Some parties requested clarification regarding the extent to which overseas precedents would be referred to by the Commission, or could be relied on by parties, in the application of the Conduct Rules.

15. The Commission recognises that the Ordinance was drafted having regard to the competition laws of a number of countries. It may well be informative to consider the analytical approach taken by other jurisdictions to assessing particular competition issues. However, the Commission is tasked with assessing potential competition concerns in markets in Hong Kong under the framework of the Ordinance. The legal frameworks underlying overseas precedents are not identical to, and may differ in certain important respects from, the Ordinance. Additionally, the structure and operation of the markets examined in overseas precedents may vary considerably from those in Hong Kong. This means that foreign precedents or analysis will rarely be an exact 'fit' for the purposes of applying the relevant legal tests under the Ordinance.

16. As such, the Commission has not simply adopted the position taken by overseas jurisdictions to particular competition issues but has tailored the Guidelines to suit the Hong Kong context.

Other publications

17. As indicated in the Overview, the Guidelines required by the Ordinance will not be the only guidance the Commission provides. The Commission will continue to prepare policies and publications to assist businesses and their advisers in understanding how to comply with the Ordinance, including with respect to sector-specific concerns. The Commission has already published a brochure, *The Competition Ordinance and SMEs*, on 30 December 2014.

18. Forthcoming publications include the Commission's Leniency Agreement Policy and its Enforcement Policy. The Commission will also publish its Memorandum of Understanding with the CA for the purpose of coordinating the performance of their respective functions, as required under section 161 of the Ordinance. To the extent that matters raised in submissions would be more appropriately dealt with in these publications, the Commission did not include them in the revised Guidelines.

Guideline on the First Conduct Rule

19. The draft Guideline on the First Conduct Rule ("**FCR**") attracted the majority of comments. This reflects the impact of the FCR on businesses across Hong Kong. The Commission noted a number of recurring themes in the submissions:

- **Creation of presumptions and new 'tests'.** A range of submissions pressed the Commission to introduce specific 'tests', 'safe harbours', 'presumptions' or 'indicators' into the Guideline which are not provided for in the Ordinance. The Commission does not propose to introduce such tests through Guidelines where the Tribunal and other courts are ultimately responsible for interpreting the Ordinance.

- **Requests for further guidance and detailed analysis.** Many submissions requested further detail on a range of specific topics relating to the FCR. The revised Guideline provides additional guidance on a number of areas. In some cases, however, parties sought the level of detail that is available in more established competition law jurisdictions. The Commission is mindful that detailed guidance from overseas agencies is a result of decades of enforcement practice and case-law by their courts. This is not yet available in Hong Kong.

- **Use of hypothetical examples.** The inclusion of hypothetical examples in the Guideline was welcomed as a helpful way to demonstrate the practical application of the Ordinance. By their very nature, such examples apply the Commission's analysis to simplified and purely hypothetical facts. To enhance the use of examples in the revised Guideline, the Commission has:
  - refined certain of the existing examples and increased the number of hypothetical examples to 25. Additional examples are now provided on topics for which requests for further detail were made, namely the exchange of information, resale price maintenance ("**RPM**") and common types of joint ventures;
  - where possible, provided additional detail in examples to give a clearer indication of when conduct is permitted and would not give rise to concerns under the FCR; and
  - indicated in the relevant examples where the Commission would likely consider the conduct to amount to Serious Anti-competitive Conduct ("**SAC**").

Terms Used in the First Conduct Rule

Undertaking: Groups of employees, their trade unions and self-employed persons

20. A small number of submissions questioned whether under the FCR, groups of employees could engage in collective negotiation activities with their employers in relation to matters such as salaries and conditions of work. The draft Guideline was silent on this topic.

21. The FCR prohibits undertakings from engaging in anti-competitive behaviour. What constitutes an undertaking is therefore a relevant consideration, particularly in considering whether groups of employees and/or trade unions are undertakings.

22. The Commission recognises the importance of this issue for a number of industries. The revised Guideline at paragraphs 2.18 and 2.19 clarifies what amounts to an undertaking. In general, an employee is an integral part of his/her employer undertaking. As a result, an agreement between a group of employees and their employer (for example in relation to matters such as salaries and conditions of work) is outside the scope of the FCR. Where a trade union acts as an 'agent' representing a number of employees in collective negotiations with an employer, such arrangements would also fall outside the FCR.

23. The revised Guideline also provides guidance on the interpretation of 'undertaking' with respect to self-employed persons (see paragraphs 2.20 and 2.21).

Undertaking: Decisive influence

24. A range of submissions requested further detail on the concept of 'decisive influence' over commercial policy, which is relevant in considering whether two or more entities may form a single undertaking. The assessment of decisive influence is highly dependent on the specific facts of the matter, with both legal and factual elements relevant to the determination. As such, the Commission has not provided an exhaustive list of the factors that it may take into account in a particular matter.

Single economic unit: Independent distributors and agents

25. Some submissions noted that it is common in Hong Kong to use independent distributors or agents. The comments received sought further detail on when such agents/distributors may form part of a single economic unit and therefore be part of the same undertaking as the supplier.

26. The revised Guideline contains additional detail on the key factors the Commission considers to be relevant in this regard.

Concerted practices: Failing to object to or distance from anti-competitive conduct

27. The draft Guideline indicated that an undertaking may be considered by the Commission to be a party to a concerted practice by merely attending a meeting at which an anti-competitive arrangement is reached and having failed to object to and publicly distance itself from such conduct. A number of submissions sought guidance on how parties who have attended such meetings can publicly distance themselves from anti-competitive arrangements. The Commission has provided more detail at paragraph 2.24 of the revised Guideline on the steps an undertaking should take to distance itself from the arrangement sufficiently to mitigate the risk of contravening the FCR.

Decision by an association of undertakings: Recommendations/fee scales

28. A small number of submissions questioned the scope of a 'decision of an association of undertakings' in relation to recommendations by a trade association or fee scales by a professional body. The draft Guideline has been amended to clarify the Commission's position that recommendations, whether binding or not, can constitute a decision of an association of undertakings. This may include recommended fee scales and 'reference' prices (see paragraph 2.36 of the revised Guideline).

Object or Effect of Harming Competition

The object of harming competition

29. Under the FCR, establishing an anti-competitive object is an alternative to establishing whether conduct has the effect of harming competition. Where conduct has the object of harming competition, the Commission is not required to examine its actual or likely effects.

30. A range of submissions queried the Commission's interpretation of object of harming competition and how this relates to the definition of SAC under the Ordinance. The revised Guideline clarifies a number of points to address these concerns:

- **Agreements having the object of harming competition.** The revised Guideline provides further guidance on when an agreement will be considered to have the object of harming competition. As detailed in paragraphs 3.3 to 3.15 of the revised Guideline, the Commission will assess the specific facts of the case and view the conduct in its context. An assessment of the aims of the arrangement viewed in its context does not require an analysis of the effects on the market of the arrangement. As highlighted in the revised Guideline, the Commission considers that, in particular, cartels that seek to price fix, share markets, restrict output or rig bids have the object of harming competition. Other forms of agreement which may have the object of harming competition include RPM, group boycotts and the exchange of future pricing or quantity information.

- **No 'automatic' contraventions of the FCR.** Unlike competition laws in a number of other jurisdictions, the Ordinance does not provide for 'automatic' or '*per se*' contraventions of the Conduct Rules. Some submissions had suggested that this was the Commission's approach to dealing with restrictions having the object of harming competition. The Commission does not equate restrictions having the object of harming competition to *per se* contraventions of the Ordinance.

- **Conduct which harms competition distinguished from SAC.** The Ordinance makes a distinction between two different concepts:
    - The analysis of a potential restriction of competition. The substantive assessment of whether conduct contravenes the FCR requires only that the Commission establish that conduct has the object or effect of harming competition (subject to any applicable exclusions or exemptions).
    - The determination of SAC. The question as to whether conduct amounts to SAC needs to be considered only when a restriction of competition having the object or effect of harming competition has been found.

  The revised Guideline has added guidance to make this distinction clearer.

- **Commission's classification of agreements having the object of harming competition.** A number of submissions suggested that the Commission should always assess conduct based on 'effects'. The Ordinance provides that conduct may either have the object or the effect of preventing, restricting or distorting competition in Hong Kong. As such, the Commission cannot adopt an interpretation of the FCR whereby all conduct is assessed by reference to its effects on competition. The revised Guideline therefore maintains the approach taken in the draft Guideline.

The effect of harming competition: Appreciability and requests for market share safe harbours

31. A range of submissions requested that the Commission apply a concept of 'appreciability' or 'materiality' as a pre-requisite for finding an anti-competitive effect. Unlike some overseas jurisdictions, the Ordinance does not contain such an explicit test.

32. Some submissions indicated that the Commission should only consider a contravention of the FCR has occurred when an anti-competitive effect crosses a pre-defined threshold. Submissions suggested that the Commission could imply 'substantial effect' into section 6 of the Ordinance or create a market share 'safe harbour'. The underlying concern appeared to be that any effect, no matter how minimal, could potentially be found to be a contravention of the Ordinance.

33. The revised Guideline does not adopt a threshold for intervention based on market share. However, additional wording is provided to clarify that for conduct to have the effect of harming competition, the effect must be more than minimal and cannot be insignificant. The Investigations Guideline also states that at any stage of its consideration of a matter, the Commission will take into account the potential impact of the alleged conduct on competition and consumers.

The effect of harming competition: Market power

34. A number of submissions requested that the Guideline include market share 'safe harbours' to indicate when the Commission would consider that certain levels of market share would not give rise to concerns under the FCR, while one party agreed that such safe harbours should not be included in the Guideline.

35. The Commission considers that market share thresholds are not an appropriate screen for anti-competitive effects in Hong Kong due to the disparate range of existing market structures. The Commission also notes that the Tribunal and other courts are ultimately responsible for interpreting the Ordinance. The Commission has not yet taken cases under the Ordinance and therefore does not have sufficient information to determine the appropriate level (if there is one) for a threshold with cross-sector application.

36. The Commission also notes a divergence in views as to the level of the safe harbours requested in submissions, which ranged from between 20% and 50%.

37. A small number of submissions considered that an arrangement could only have an anti-competitive effect when an undertaking holds a substantial degree of market power, as is the case under the Second Conduct Rule ("**SCR**"). The Commission considers it inappropriate to blur the distinction between the two Conduct Rules. The Ordinance specifically refers to 'substantial' market power in the SCR, and it is widely accepted that competition concerns can arise with a degree of market power below the level required under the SCR.

38. Market share thresholds were also requested in the context of the SCR and the Commission's reasons against introducing such thresholds are set out in further detail in paragraph 79 below.

Serious Anti-competitive Conduct (SAC)

39. Various submissions requested that the Commission more precisely define the circumstances in which SAC would arise. In particular, some parties submitted that the Commission should indicate that vertical agreements and/or RPM fall outside the scope of SAC, even though the definition of SAC under the Ordinance makes no distinction between horizontal and vertical agreements.

40. As indicated above at paragraph 30, the Ordinance makes a distinction between:

- SAC, as used in sections 67 and 82, and section 5 of Schedule 1 of the Ordinance; and
- the object or effect of harming competition, as used in the FCR.

41. That distinction was blurred in many of the submissions on this topic. This may have led to a general view that certain categories of conduct should not be enforced as SAC, even though they could arguably fall within the definition of SAC in the Ordinance. Some adjustments to the text in the revised Guideline provide further clarity on the Commission's interpretation of these provisions. The Commission has also indicated in the relevant hypothetical examples where it would consider the conduct to amount to SAC.

Agreements that May Contravene the First Conduct Rule

Exchange of information

42. A range of submissions sought further detail on the exchange of information. Specifically, parties sought further guidance on the indirect exchange by competitors of commercially sensitive information, such as through a customer or supplier. The revised Guideline at paragraphs 6.41 to 6.43 provides more detail on this issue and amendments have been made to clarify the Commission's approach to information exchange generally.

Vertical price restrictions: Resale price maintenance (RPM)

43. A number of submissions asked the Commission to reconsider its approach to fixed or minimum RPM.

44. The Commission maintains its view that RPM arrangements have an inherent potential to harm competition in Hong Kong. The Commission does not accept the proposition that RPM warrants a 'light touch' because it may be a pervasive practice in Hong Kong. Anti-competitive conduct may indeed be currently a common business practice, but this is more likely to have been the result of the absence of a sector-wide competition law in Hong Kong.

45. The revised Guideline continues to take the view that RPM may have the object of harming competition and that there may be circumstances when it amounts to SAC. The revised Guideline includes specific examples of RPM which will be considered to have the object of harming competition (such as where the arrangement is instigated by a distributor who seeks to persuade its supplier to impose RPM on the distributor's competitors). A new hypothetical example has also been provided to give practical assistance in identifying when RPM arrangements have the object of harming competition.

46. However, in certain cases RPM arrangements may be made for a pro-competitive purpose and so do not have the aim of harming competition in the market. The Commission also notes that RPM does not 'automatically' contravene the FCR. RPM arrangements having the object (or effect) of harming competition might still be excluded from the FCR by reference to efficiencies.

47. The revised Guideline also states that a specific RPM arrangement may not have the object of harming competition when viewed in its context (see paragraphs 6.74 and 6.75 of the revised Guideline on when an agreement will be considered to have the object of harming competition). In those circumstances, the Commission would assess whether the RPM causes harm to competition by way of its effects on the market.

Additional guidance provided on joint ventures and other types of vertical agreements

48. In response to a number of submissions, the revised Guideline provides additional guidance on several specific topics that had not been addressed in detail in the draft Guideline. These enhancements provide additional clarity on common commercial practices to enable self-assessment by businesses.

49. More detailed guidance, including additional hypothetical examples, has now been provided on certain types of joint ventures, namely, joint selling, distribution and marketing agreements and joint tendering arrangements. The revised Guideline at paragraphs 6.90 to 6.114 illustrates when such arrangements are and are not likely to give rise to concerns under the FCR.

50. Some submissions noted the prevalence of franchising and selective distribution agreements in Hong Kong, particularly in the retail sector. The revised Guideline includes new sections to address these topics.

Exclusions and Exemptions from the First Conduct Rule

Agreements enhancing overall economic efficiency

51. Certain parties sought further detail on how the Commission intends to interpret the exclusion for agreements enhancing overall economic efficiency in section 1 of Schedule 1 to the Ordinance. The Commission considers the level of description already provided in the draft Guideline to be a sufficient basis for self-assessment. However, with a view to ensuring a closer alignment with the wording of the test in section 1 of Schedule 1, certain revisions have been made to clarify the Commission's interpretation.

Burden of proof under section 1, Schedule 1

52. A number of submissions questioned whether it was correct that the burden of proving the conditions of section 1 of Schedule 1 rests with the undertaking seeking the benefit of the general exclusion.

53. The Commission remains of the view that in relation to each of the general exclusions in Schedule 1, it is for the party asserting the availability of the exclusion to provide the evidence that the conditions of the exclusion are met. This view is consistent with the scheme of the Applications process, where applicants must provide sufficient information to the Commission for it to be able to make a Decision or issue a Block Exemption Order under the Ordinance.

Request to exempt vertical agreements from the FCR

54. The Commission's approach to vertical agreements received many comments. Many parties welcomed the acknowledgement in the draft Guideline that, in general, most vertical agreements do not impact competition. However, some submissions argued that even those vertical agreements which do have anti-competitive effects should be exempted from the Ordinance. These parties requested that the Commission issue a block exemption order relating to all vertical agreements. Alternatively, they suggested the Commission pursue vertical agreements only under the SCR.

55. In the revised Guideline, the Commission has maintained its position that in most cases vertical agreements do not give rise to concerns under the FCR and, where they do, they will generally be assessed on the basis of their effects on competition in Hong Kong. It must, however, be recognised that some vertical arrangements may be just as harmful to competition as horizontal cartel conduct.

56. Vertical agreements clearly fall within the terms of the FCR and the Commission cannot confine analysis of such arrangements to the SCR. The revised Guideline also maintains the Commission's approach in the draft Guideline that some vertical arrangements may be considered SAC within the meaning of section 2 of the Ordinance.

57. The Commission notes that it can only make a block exemption order under section 15 of the Ordinance on the basis of reliable evidence showing that a category of agreements satisfies the exclusion in section 1 of Schedule 1 for agreements enhancing overall economic efficiency.

Compliance with legal requirements

58. A small number of submissions questioned the scope of the general exclusion in section 2 of Schedule 1 to the Ordinance. Some considered that the Commission was adopting too strict an interpretation. The Commission, however, is bound by the terms of the Ordinance which defines 'legal requirement' to mean a requirement "imposed by or under any enactment in force in Hong Kong" or "imposed by any national law applying in Hong Kong". The principles of statutory interpretation also suggest that, as an exclusion to the FCR, the provision should be construed narrowly. Therefore, outside of the circumstances indicated in section 2 of Schedule 1, the Commission considers that this exclusion would not be available.

59. The Commission was asked to formally acknowledge 'regulatory requirements' when conducting an analysis of potentially anti-competitive conduct under the FCR. It was submitted that 'circulars', 'guidance' or similar publications from public or regulatory authorities in a specific sector should be taken into account when the Commission assesses conduct under the FCR.

60. The Commission cannot, in the abstract, bind itself to the views of public or regulatory authorities, who may pursue different policy objectives to those of the Ordinance. However, for businesses who consider themselves subject to such requests by public or regulatory authorities, the Commission notes that the revised Investigations Guideline already indicates that the Commission's investigations will include gathering information from third parties, which could include public or regulatory authorities, who may have knowledge of the conduct in question.

Guideline on the Second Conduct Rule

61. The Guideline on the SCR generally attracted fewer comments than the Guideline on the FCR.

62. A number of submissions commented on the market definition section in Part 2 of the Guideline and some amendments have been made in the revised Guideline to reflect these submissions (see paragraphs 64 to 70 below). The principles of market definition also apply to the FCR and the Merger Rule, and the amendments to the market definition section will therefore also be relevant in the application of these rules.

63. In addition, as with the Guideline on the FCR, a number of submissions sought more detailed guidance on specific topics. The revised Guideline provides additional detail in certain areas, such as the circumstances in which an abuse may have the object of harming competition. With respect to other areas, particularly in relation to the examples of abusive conduct in Part 5 of the Guideline, the level of guidance requested by parties often reflected the detail provided in more established competition regimes. As indicated in paragraph 19 above, detailed guidance from overseas agencies is a result of decades of enforcement practice and case-law by their courts. In the absence of relevant precedents in Hong Kong, the Commission has not provided additional guidance on these matters.

Defining the Relevant Market

Relevance of market definition precedents

64. Certain parties argued that the Commission should indicate that it would be bound by its position in previous cases as to how a particular market is defined.

65. The Commission considers that every case must be assessed on its own facts, including with respect to the definition of the relevant market. Over time, markets change such that the market definition which was considered in a previous case may no longer reflect the current state of the market. As stated in paragraph 2.9 of the revised Guideline, a defined relevant market in one case will therefore not bind the Commission in another.

66. However, as a matter of practice, the relevant markets previously considered may serve as a guide for parties as to the Commission's likely approach in future cases, and will be taken into account by the Commission when assessing market definition in another case.

67. To clarify the Commission's position, amendments have been made to the draft Guideline, including the deletion of the statement that "market definition has no precedential value".

Relevance of supply-side substitutability for market definition

68. Certain submissions argued in favour of including supply-side substitutability as a relevant factor at the market definition stage, among other things on the basis of the approach taken in some overseas jurisdictions. The Commission has not amended the Guideline in this respect and would note in any event that international practice is not consistent on this point.

69. As indicated in paragraphs 2.10 and 2.17 of the revised Guideline, demand side substitution is a central factor for the purposes of market definition. Where an assessment of demand side substitution leads to a particular conclusion as to the scope of the relevant market, the Commission is of the view that an assessment of supply-side substitution will very rarely alter that conclusion.

70. As such, paragraph 2.34 of the revised Guideline indicates that the Commission generally will not consider supply-side substitutability when defining the relevant market. As stated in paragraph 2.35 of the revised Guideline, all competitive constraints, including supply-side considerations, will in any event be considered in the assessment of market power.

Assessment of Substantial Market Power

Relationship between a substantial degree of market power, market power and section 7Q of the Telecommunications Ordinance (Cap 106) ("TO")

71. A number of submissions requested clarification as to the relationship between 'a substantial degree of market power' under the SCR and market power, which may be relevant under the FCR (see paragraphs 3.22 and 3.23 of the revised Guideline on the FCR). The relationship between a substantial degree of market power and market power was also raised in submissions on the Guideline on the FCR (see paragraph 37 above).

72. The Commission notes, as was already indicated in paragraph 3.6 of the draft Guideline, that market power is a matter of degree. The degree of market power which is relevant for the application of the SCR is a 'substantial degree'. The degree of market power at which concerns may arise under the FCR is not the same and is typically less.

73. Other submissions provided comments and/or requested clarification regarding the relationship between 'a substantial degree of market power' under the SCR and 'dominant position' under the new section 7Q of the TO.

74. The Commission notes that the Guidelines are issued pursuant to the Ordinance and are required to provide guidance on the matters specified in the Ordinance. The Commission has therefore not included guidance on section 7Q of the TO in the Guidelines.

Determining 'competitive levels' of pricing, output or quality

75. Paragraph 3.2 of the Guideline explains that substantial market power can be thought of as the ability profitably to charge prices above competitive levels, or to restrict output or quality below competitive levels, for a sustained period of time. Some submissions requested details as to how the Commission will assess 'competitive levels' in this context.

76. The extent to which the competitive level will need to be assessed, and the methodologies used for assessment, will differ depending on the case in question. As such, the Commission has not provided further detail on how the competitive level should be assessed in the revised Guideline. The key factors for the assessment of substantial degree of market power are already discussed in considerable detail in paragraphs 3.9 to 3.32 of the revised Guideline.

Market share threshold for a substantial degree of market power

77. A large number of submissions requested the inclusion of some form of market share-based threshold, including a specific percentage to assess whether an undertaking has a substantial degree of market power. The market share thresholds requested included a 'safe harbour' threshold below which an undertaking would be considered not or unlikely to have substantial market power and, in a more limited number of cases, a threshold above which an undertaking would be presumed to have a substantial degree of market power. Other submissions were of the view that a market share threshold should not be included in the Guideline.

78. After careful consideration of these submissions, the Commission has not amended the Guideline to include a market share-based threshold.

79. This is for a number of reasons:

- Market share is but one factor in determining whether an undertaking has substantial market power. Factors such as ease of entry and expansion, availability of supply-side substitution and buyer power have the capacity to prevent a firm with a high market share from having a substantial degree of market power.
- The Commission has not yet taken cases under the Ordinance and as such the Tribunal has not yet issued any decisions as to the interpretation of the 'substantial degree of market power' standard.

- In addition, market structures in Hong Kong vary widely. There is a risk that applying a particular market share threshold across sectors would become the focal point of analysis of substantial market power, even though it may not accurately reflect the competitive structure in a particular sector. Such an approach could lead to an incomplete and potentially incorrect assessment as to the existence or absence of substantial market power in that sector.
- By contrast, it has been possible to provide an indicative market share threshold appropriate for the substantive assessment of mergers in the Merger Rule Guideline, based on the experience of the CA in a specific and narrowly defined sector (the telecommunications sector).
- The submissions received in favour of the inclusion of a market share threshold do not themselves provide a consistent view as to the appropriate level of a threshold. In this respect, the 'safe harbour' thresholds suggested by parties ranged from 25% to 50%, while one party also suggested that a threshold of 80% should be presumptive of a substantial degree of market power.

Relevance of market concentration

80. The Commission received a request for clarifications regarding the relevance of market concentration in the analysis of market power and the methods of measuring market concentration.

81. As mentioned in the draft Guideline, measuring the level of concentration in a market may provide useful information about market structure. The Commission expects that in practice it will not be necessary to measure market concentration in many cases. Where other factors relevant to the assessment of substantial market power lead to a particular conclusion as to the existence or absence of substantial market power, the Commission believes that measuring market concentration is unlikely alter that conclusion.

82. To clarify the Commission's position, the revised Guideline refers to the fact that the level of concentration in the market may be measured 'in some cases' and does not discuss methods for measuring market concentration.

Abuse of Substantial Market Power

Availability of economic efficiency and other justifications

83. A number of submissions requested clarification as to the extent to which economic efficiency and other justifications would be taken into account in the assessment of conduct under the SCR and/or further detail on the justifications which may apply.

84. Unlike the FCR, the Ordinance does not provide for an exclusion for conduct enhancing overall economic efficiency with respect to the SCR (i.e. section 1 of Schedule 1 to the Ordinance applies only to the FCR). The Commission clarifies in the revised Guideline that the exclusion under section 1, Schedule 1 does not apply to the SCR.

85. However, additional text in paragraph 4.5 of the revised Guideline recognises that, despite the absence of an explicit exclusion in the Ordinance, parties may wish to refer to efficiencies associated with particular conduct which mean that no net harm to consumers arises. Where such efficiencies apply, the conduct may not be considered to contravene the SCR. The Commission considers, however, that this will likely only be the case in exceptional circumstances where the claimed efficiencies are in fact passed on to consumers and no net harm to consumers can be demonstrated.

86. In addition, as was already stated in paragraph 4.4 of the draft Guideline, the Commission may examine "legitimate objective[s] unconnected with the tendency of the conduct to harm competition" put forward by the parties when investigating alleged abuses of substantial market power. To provide further clarity, the Commission has included an example of such a possible legitimate objective in paragraph 4.4 of the revised Guideline.

Conduct which may have the object of harming competition

87. A number of parties requested that the Commission clarify the basis on which conduct will be considered to have the object of harming competition and/or to specify explicitly which types of conduct may have such an object.

88. Paragraph 4.8 of the revised Guideline notes that the 'object' of conduct refers to the purpose or aim of the conduct engaged in by the undertaking considered in its context. The category of conduct which may have the object of harming competition is therefore an open one which cannot be reduced to any exhaustive list (though the concept of an anti-competitive object can only be applied to conduct which is by its very nature harmful to competition). Determining the nature of particular conduct requires an objective assessment of its aims.

89. The draft Guideline already provided one example of such conduct, namely where an undertaking with substantial market power sets prices below its average variable cost ("**AVC**"). For further clarity, paragraph 4.15 of the revised Guideline provides additional examples of conduct which may have the object of harming competition.

90. Some submissions also argued that all abusive conduct should be assessed on the basis of its effects on competition, while others favoured at least limiting the extent to which such conduct would be assessed as having the object of restricting competition.

91. The SCR explicitly envisages that conduct may have the object, as well as effect, of preventing, restricting or distorting competition in Hong Kong. The Commission considers it would be inappropriate to adopt an interpretation of the SCR whereby all conduct would be assessed by reference to its effects on competition.

92. The Commission expects, however, that it will in practice assess most conduct within the scope of the SCR by reference to its actual or likely effects on competition. An amendment has been made in paragraph 4.13 of the revised Guideline to reflect this position.

Examples of Conduct that May Constitute Abuse

Treatment of 'exploitative' conduct

93. Several parties requested explicit confirmation as to whether 'exploitative' conduct, such as the imposition of unfair prices or other unfair trading conditions, falls within the scope of the SCR.

94. The Commission notes that international practice has sometimes categorised abusive conduct under headings such as 'exploitative', 'exclusionary' and/or 'discriminatory'. The Guideline explains that the category of conduct capable of amounting to an abuse is an open one and that potentially any conduct which has the object or effect of harming competition might be an abuse. The Commission has, however, focused in the Guideline on exclusionary conduct which may harm the *process of competition* in the market. Such conduct will be the main enforcement focus under the SCR.

Predatory pricing

95. A number of submissions favoured a more lenient approach towards predatory pricing, with several arguing against the treatment of pricing below AVC as having the object of harming competition.

96. The Commission has not amended the treatment of predatory pricing in the Guideline.

97. Paragraph 5.3 of the revised Guideline recognises that offering low prices to consumers is the epitome of competitive conduct. The Commission is therefore conscious of the need for caution when applying the SCR to alleged predatory pricing. For this reason, it will generally consider whether there is a prospect of anti-competitive foreclosure when assessing predatory pricing conduct, to the extent that reliable data is available (see paragraph 5.5 of the revised Guideline).

98. However, where an undertaking with substantial market power prices below its AVC, the undertaking is making losses on each unit of output it produces even with respect to the variable costs for each unit. Such conduct is thus unlikely to have any economic rationale but rather to be aimed at the anti-competitive foreclosure of competitors. For this reason, as stated in paragraph 5.6 of the revised Guideline, the Commission is likely to infer that the conduct has the object of harming competition, such that it does not need to demonstrate actual or likely anti-competitive foreclosure.

99. A smaller number of parties argued that 'recoupment' of losses stemming from below-cost pricing should be a necessary pre-condition for the establishment of predation.

100. The Guideline recognises that the possibility of recoupment may provide significant evidence of likely harm to competition. However, it is not the only factor which may demonstrate such harm. The revised Guideline therefore maintains the position that recoupment may be considered at the Commission's discretion.

Guideline on the Merger Rule

101. Amongst the total of 64 submissions received, a smaller number made comments on the draft Guideline on the Merger Rule compared to other draft Guidelines. This may be because the Merger Rule has only restricted application in cases where an undertaking that directly or indirectly holds a carrier licence issued under the Telecommunications Ordinance (TO) is involved in a merger.

Interpretation and application of the Merger Rule

Meaning of 'control'

102. Some submissions sought more guidance on what would constitute a 'merger' within the meaning of the Merger Rule. Whilst guidance was already given in Part 2 of the draft Guideline, some respondents submitted that the Commission should provide more specific detail. In particular, guidance was sought on what would constitute acquisition of 'control' of another undertaking, in terms of exercising 'decisive influence' on another undertaking and holding various forms of control (sole, joint control, negative sole control, legal and *de facto* control etc.), and what would constitute a full-function joint venture.

103. The Commission is aware of some extensive guidance provided by some jurisdictions on the meaning of 'merger' and it would appear that the respondents had such guidance in mind when making these comments. Whilst guidance issued by other jurisdictions may be informative, the Commission considers that a direct adoption of such guidance is not appropriate, as such guidance was developed on the basis of different merger control regimes, precedents, corporate practices and market environment. Hong Kong has its own new Merger Rule, and the corporate practices and market environment in Hong Kong may not be the same.

104. The starting point for the Commission in interpreting the Merger Rule will be the Merger Rule provisions of the Ordinance. The Commission has considered the appropriate level of guidance that should be given on the scope of the Merger Rule, and considered that any guidance should be given on a 'general principle' basis, such that the Commission would be able to apply the Merger Rule provisions to the specific circumstances of each case.

105. The Commission does not consider it appropriate to provide guidance on what would constitute a 'merger' in various scenarios as requested. However, principles-based further guidance is added in paragraph 2.7 of the revised Guideline on the meaning of 'decisive influence', which refers to the power to make decisions relating to the strategic commercial behaviour of an undertaking.

Indicative safe harbours

106. Part 3 of the draft Guideline provided two indicative safe harbour measures, i.e. the four-firm concentration ratio and Herfindahl-Hirschman Index (commonly referred to as 'CR4' and 'HHI' respectively). Some respondents suggested variations or alternatives to the two indicative safe harbour measures. One submitted that the safe harbours should not only be 'indicative in nature' in order to be meaningful.

107. It should be noted that these safe harbours are merely intended to provide a screening device to identify merger transactions that are more likely to warrant further examination, such that the parties concerned are able to conduct their own assessment. They do not replace a case-by-case analysis by the Commission in light of the prevailing market conditions in each case.

108. Further, the two safe harbours have been well-tested in Hong Kong's telecommunications sector for over a decade in the context of the enforcement of section 7P of the TO. As the Merger Rule is only applicable to a merger that directly or indirectly involves a carrier licensee, the Commission does not consider it necessary to revise the two safe harbour measures.

Procedural Matters

Indicative timelines

109. Comments were made that indicative timelines should be provided for various processes under the Merger Rule, including processing a request for informal advice, processing an application for a decision that a merger is excluded, and considering a commitment proposal.

110. Whilst the Commission will endeavour to process such requests or applications in an efficient and timely manner, the time required for completing these processes will depend on a number of factors, including the complexity of the matter in question, whether and how soon the data and information required for conducting the analysis is available, and the resources available to the Commission at the time. The Commission does not consider it appropriate to introduce any indicative timelines for processes relating to the Merger Rule.

Informal advice

111. One respondent asked why the process of informal advice would only be available for a proposed merger not in the public domain.

112. The revised Guideline clarifies that the informal advice process will in fact be available to proposed mergers irrespective of whether or not they are in the public domain.

Procedural Guidelines

113. The majority of submissions received during the consultation process provided comments on the three draft Procedural Guidelines. Many submissions asked for greater clarity and consistency generally across the three Guidelines on issues that arise across the various Commission processes, such as confidentiality. These comments have been taken into account across the revised Procedural Guidelines, which are discussed in turn below.

Guideline on Complaints

Should a complainant have a 'legitimate interest' in the complaint?

114. A number of submissions suggested the Commission require complainants to demonstrate a sufficient level of interest, such as a 'legitimate interest' as applies under EU competition law, to bring a complaint to the Commission. The Commission notes that there is no such requirement under the Ordinance and considers it would be inappropriate to impose such a requirement in the Hong Kong context.

115. Complaints are a source of information for detecting non-compliance with the Ordinance. The Commission's position is that if a person suspects anticompetitive conduct, they are encouraged to report it. Whether it has directly impacted the complainant or not is irrelevant. The public interest is served by reporting the possible contravention. In a broad sense, everyone in Hong Kong has a legitimate interest in ensuring compliance with the Ordinance.

Anonymous complaints

116. Certain submissions suggested that the Commission should limit its discretion to consider anonymous complaints to protect the interests of the subject of those complaints and avoid the Commission's resources being overwhelmed by complaints lacking merit. The Commission does not intend to introduce such a limitation on how complaints are dealt with on the basis that:

- it does not intend to reduce the possible sources of information about possible anticompetitive conduct; and
- under section 37(2) of the Ordinance, the Commission may, in particular, not investigate complaints that are frivolous, vexatious or otherwise unfounded.

117. Amendments have been made in the revised Complaints Guideline to clarify the matters the Commission will take into account in considering whether a complaint is misconceived or lacking in substance under section 37(2)(b) of the Ordinance.

Acknowledging the complaint

118. Some submissions suggested that the Commission should always acknowledge receipt of complaints in writing.

119. Acknowledgment of a complaint in writing will follow where the complaint is made in writing and contact details have been provided. However, it may be the unnecessary and burdensome to acknowledge complaints in writing in certain circumstances, for example where the complaint is made over the telephone or in person, and receipt of the complaint is acknowledged in that context. It will also not be possible to acknowledge anonymous complaints.

Evidence provided by the complainant

120. A small number of submissions queried why the Commission did not include a 'checklist' of information that must be provided in support of a complaint.

121. Complainants are not often in a position to provide all material relevant to the Commission's consideration of whether the Ordinance may have been contravened. For example, a complainant alleging predatory pricing could hardly be expected to know whether the alleged contravener was pricing below its relevant cost. Moreover, what information is relevant depends on the circumstances of individual cases. To exclude consideration of complaints in the first instance because not all relevant information is provided would unduly limit the class of people able to make complaints to the Commission.

122. However, the Commission expects complainants to furnish all relevant information in their possession either when making the complaint or when asked by the Commission to do so. The draft Complaints Guideline has been amended to more clearly reflect this position (see paragraph 2.4 of the revised Complaints Guideline).

Complainant's 'obligation' to keep complaints confidential

123. Certain submissions queried the apparent suggestion in the draft Complaints Guideline that the Commission would require complainants to keep their complaints confidential, while others submitted that the Commission should indeed force complainants to do so.

124. The Ordinance does not oblige complainants to keep their complaint confidential. Paragraph 3.2 of the draft Complaints Guideline was merely intended to state the Commission's preference that complainants keep their complaint confidential with a view to protecting the integrity of the investigation. Amendments have been made in the revised Complaints Guideline to clarify the Commission's intent and to request that complainants inform the Commission prior to disclosing their complaint.

Assessing whether to consider a complaint further

125. The Commission set out a number of factors in paragraph 4.3 of the draft Complaints Guideline (repeated in paragraph 3.4 of the draft Investigations Guideline in respect of the Initial Assessment Phase) which it would take into account in deciding whether or not to pursue a complaint further. The factors in paragraph 4.3 have been deleted in the revised Complaints Guideline and expanded upon in the draft Investigations Guideline (see paragraphs 130 to 134 below for further discussion).

Engagement with the complainant and other parties

126. A number of submissions suggested that the complainant should be informed of the progress of an investigation and one requested that further guidance be provided on a complainant's procedural rights and obligations, including access to information (see also discussion at paragraph 135 of this Guide).

127. As stated at paragraph 1.4 of the draft Complaints Guideline, the Commission does not act on behalf of complainants. The Commission will exercise its enforcement discretion and choose matters to investigate having regard to the public interest in having competitive markets, rather than complainants' interests. In balancing this public interest and transparency considerations, the Commission will seek to develop practices that are suited to the Hong Kong environment.

128. With respect to paragraph 5.4 of the draft Complaints Guideline, the Commission intended to convey the position that, as advancing a matter to an Initial Assessment was an internal procedural step for the Commission, it would not generally advise the complainant that this internal step had been taken. It will however keep complainants up to date as regards the general progress of the Commission's consideration of issues relevant to their complaint when it is appropriate to do so. Paragraph 5.4 has been amended in the revised Complaints Guideline to reflect this position.

129. The draft Guideline already made it clear that, whenever the Commission decides to take no further action, it will advise the complainant of this decision and provide an explanation of its decision.

Guideline on Investigations

Enforcement discretion and assessing whether to investigate a matter further

130. The Commission set out a number of factors in paragraph 3.4 of the draft Investigations Guideline which it would take into account in deciding whether or not to pursue a matter further during the Initial Assessment Phase (these were also in paragraph 4.3 of the draft Complaints Guideline). The Commission received a large number of submissions in relation to these factors. The revised Investigations Guideline provides further guidance.

131. Amendments have been made to more clearly express the Commission's intended exercise of its enforcement discretion. Paragraph 3.6 of the revised Investigations Guideline clarifies that the Commission may discontinue its consideration of a matter at any time, including during the Initial Assessment and Investigation Phases.

132. Certain parties asked the Commission to clarify the meaning of 'successful outcome'. For example, there were concerns that this factor may be read to indicate that the Commission will avoid 'hard' cases. This is not the Commission's intention. The measure of a successful outcome will differ depending on the particular case. It includes consideration of factors such as:

- whether the Commission is likely to be able to uncover sufficient evidence to prove whether or not the Ordinance has been contravened; and
- the remedies available.

133. The fact that a case will likely be hard fought or involve respondents with substantial means is not a relevant consideration as to whether the Commission will investigate a potential contravention of the Ordinance.

134. A small number of submissions also requested guidance on the factors the Commission will take into account when deciding on an enforcement response in a particular matter. Such matters are more appropriately addressed in the Commission's enforcement policy which will be published in the coming months (see paragraph 18 of this Guide).

Access to Commission's information

135. A few submissions sought guidance on whether persons would have access to the Commission's file. The Tribunal, rather than the Commission, is the decision maker. Under the Ordinance, the Commission is required to build a case which it will bring before the Tribunal. In these circumstances it will be for the Tribunal to issue rules of procedure under section 158 of the Ordinance, setting out guidance on the relevant practice and procedures for proceedings before the Tribunal, including in relation to access to the Commission's information.

Commission's use of Investigation Powers generally

136. Some submissions sought further guidance on the circumstances in which the Commission would rely on its Investigation Powers, as defined in the draft Investigations Guideline, to gather information. Several submissions proposed that there should be restrictions on the Commission's discretion to exercise these powers (some submissions requested, for example, that these powers be used only in 'exceptional circumstances').

137. The Ordinance clearly sets out the relevant thresholds for the Commission to satisfy before these Investigation Powers may be exercised. Once the relevant legal test is satisfied, there is no further requirement that the Commission apply particular criteria before it may elect to exercise its compulsory powers, or that it provide advance notice of its decision to exercise these powers to relevant persons. To clarify that that the Commission did not intend to depart from the processes and powers prescribed by the Ordinance, a number of paragraphs in the draft Investigations Guideline (such as paragraphs 5.8, 5.22 and 5.29) have been revised to follow more closely the wording of the relevant provisions of the Ordinance.

Confidential information and disclosure

138. Many submissions sought further clarification of the treatment of confidential information generally.

139. The Ordinance provides a detailed regime for the classification and handling of confidential information by the Commission. The Ordinance provides that parties providing information to the Commission may claim confidentiality providing written reasons as to why in their view the information is confidential. However, the Commission has the power under section 126(1)(b) of the Ordinance to disclose confidential information in certain circumstances.

140. The Commission will always endeavour to ensure, as provided by the Ordinance, that confidential information is only disclosed under section 126(1)(b) in the performance of its functions, and then only to the extent that it satisfies the considerations and necessity criteria in section 126(3). The revised Investigations Guideline clarifies that the Commission considers it to be in parties' interests to clearly specify the reasons for claiming confidentiality, due to the operation of the Ordinance.

141. Amendments have been made in the revised Investigations Guideline (see also paragraphs 153 to 155 of this Guide below in relation to the treatment of information provided in the Applications context) to:

- explain the Commission's understanding of how the Ordinance operates in relation to confidential information and its disclosure; and
- emphasise that it will be in parties' interests to make specific and justified claims for confidentiality.

Subsequent use of information provided to the Commission voluntarily

142. A large number of submissions sought to address the extent to which the Commission could use information voluntarily provided for purposes other than that for which it was provided or acquired.

143. The Commission may use information provided to it voluntarily for any purpose under the Ordinance, unless prohibited by law. This position is expressly set out at paragraph 6.17 of the revised Investigations Guideline (as well as at paragraph 4.1 of the revised Applications Guideline). Paragraph 6.17 of the revised Investigations Guideline also states that the Commission will not normally accept information or documents with any restrictions on the use of the information. This means that parties who voluntarily provide information to the Commission cannot rely on an implied undertaking that it will not be used in connection with other Commission matters, or that the information has been accepted on a 'without prejudice' or limited waiver basis, unless the Commission has expressly agreed to do so. The Commission is unlikely to expressly agree to accept information on a 'without prejudice' or limited waiver basis except in limited circumstances.

144. The Investigations Guideline sets out the specific requirements of the Ordinance regarding the privilege against self-incrimination and legal professional privilege. The Commission has not attempted to summarise the position at common law, which does not fall within the scope of the Guidelines and which may change over time.

Requests for information

145. Certain submissions sought further clarity on the criteria the Commission would apply in choosing whether to seek information under section 41 of the Ordinance or on a voluntary basis. It should be noted that the Commission generally expects requests for information to be written, whether made under a section 41 notice or by letter, and that a section 41 notice should not impose higher burden on recipients.

146. In response to submissions that the Commission must have regard to the burden imposed on recipients of section 41 notices, the draft Investigations Guideline had already indicated that the Commission would endeavour to provide reasonable timeframes for persons to comply with a section 41 notice, having regard to the nature and volume of information and documents requested. The Commission notes that this already goes beyond the requirements of the Ordinance.

Attendance by legal advisers at premises that are the subject of a section 48 warrant

147. A small number of submissions addressed the extent to which the Commission is required to wait for legal advisers before commencing a search under section 48 of the Ordinance. The Ordinance does not require the Commission to wait any period for a person's legal advisers to attend the premises before commencing a search. As already indicated at paragraph 5.31 of the draft Investigations Guideline, Commission officers will allow for a reasonable time in the relevant circumstances for external legal advisers to attend where there are none already at the premises. However, preserving the integrity of the search and evidence will be the paramount consideration in the exercise of Commission officers' discretion.

Information obtained in an investigation which is subject to legal professional privilege

148. Some submissions sought guidance on how the Commission intends to treat privileged materials obtained in an investigation. Drafting has been added to the revised Investigations Guideline at paragraph 5.40 to indicate that the Commission intends to establish and publish a procedure for dealing with disputes with respect to claims to legal professional privilege in the context of the Commission exercising its Investigation Powers and notably powers conferred by warrant under section 48 of the Ordinance.

Consent orders as a possible outcome of Investigation Phase

149. A few submissions requested guidance on a consent order process. As with the other possible outcomes of the Investigation Phase, the circumstances in which a consent order may be appropriate will vary from matter to matter. Paragraph 7.23 of the revised Investigations Guidelines provides more detail on the possible terms of a consent order in this context.

Indicative timeframes for the Commission's investigative processes

150. A very large number of submissions requested that the Commission place timeframes on its processes for assessing complaints and other investigative processes.

151. The Commission considers the length of investigations will differ markedly depending on issues such as:

- the complexity of the investigation;
- the availability of evidence such as key data; and
- the cooperation (or lack thereof) of the parties under investigation.

152. The Commission will endeavour in all matters to conduct these processes in an efficient and timely manner, in the performance of its functions under the Ordinance.

Guideline on Applications

Confidentiality claims made in relation to an Application for a Decision or Block Exemption Application

153. A number of submissions queried whether applicants needed to justify claims for confidentiality to the Commission and also sought clarification of the treatment and disclosure of confidential information in the context of the Applications process.

154. The Commission has added further guidance to emphasise that it will be in applicants' interests to avoid making overly broad claims for confidentiality, due to the operation of the Ordinance.

155. Consistent with the amendments made to the revised Investigations Guideline (see paragraphs 138 to 141 of this Guide), drafting changes have also been made to the revised Applications Guideline to explain how the provisions relating to confidential information generally operate under the Ordinance.

Initial Consultation before applying for a Decision or Block Exemption Order

156. A large number of submissions argued that the process for applying for a Decision or a Block Exemption Order should somehow be separated from other Commission processes, in particular enabling parties to consult the Commission about their conduct without risk of alerting the Commission to a likely contravention of the Ordinance.

157. The Commission's view is that it would not be an appropriate use of the Applications process for parties to be able to 'test the water' about conduct that has already occurred and may have contravened the Ordinance without risk of subsequent action, especially in the longer term.

158. As the draft Applications Guideline makes clear, parties are able to approach the Commission before they enter commercial arrangements which might, but for a relevant exemption or exclusion, contravene the Ordinance. Similarly, parties should self-assess their circumstances and approach the Commission only where they wish to seek greater legal certainty, as there is no need for a Commission decision for exemptions or exclusions to take effect.

159. However, the Commission's intention in this process is that parties have an open dialogue with the Commission about their intended Application without unnecessary public disclosure of commercially sensitive information. To reflect this, the draft Applications Guideline has been amended to confirm that the consultation meetings will take place on a confidential basis, and that confidential information provided to the Commission during an Initial Consultation will be treated in accordance with Part 8 of the Ordinance and the revised Application Guideline.

160. The Commission received a number of requests for it to begin considering applications for a Decision or Block Exemption Order or commence work on Commission initiated Block Exemption Orders prior to, or immediately after, commencement of the Ordinance. The Commission acknowledges these requests and is considering whether any preparatory work can be done before the Competition Rules are in effect.

Subsequent use of information provided to the Commission in the Applications process

161. A large number of submissions sought to address the extent to which the Commission could use information voluntarily provided for purposes other than that for which it was provided or acquired.

162. As already discussed at paragraph 143 above, paragraph 4.1 of the revised Applications Guideline is consistent with the approach followed in the Commission's investigative processes. Parties who voluntarily provide information to the Commission cannot rely on an implied undertaking that it will not be used in connection with other Commission matters, or that the information has been accepted on a 'without prejudice' or limited waiver basis.

Consideration of exemption or exclusion decisions in other jurisdictions

163. A small number of submissions suggested that the Commission take into account, or inquired whether the Commission would take into account, decisions of other competition authorities when considering Applications for Decisions or Block Exemption Orders.

164. While it can be informative to consider the analytical approach taken by other jurisdictions to assessing competition issues, the impact of conduct on markets in Hong Kong will rarely be identical to the impact of the same general conduct on markets in other jurisdictions. The Commission will assess the relevant conduct under the framework of the Ordinance and by reference to the specific markets concerned in Hong Kong.

Categories of agreements in Block Exemption Applications to be of wider industry use or adopted sector-wide

165. A large number of submissions on the draft Applications Guideline related to whether or not it was appropriate to require a Block Exemption Order to be representative of wider industry interest. The Commission's intention is to make it clear that it is not satisfactory to suggest that, on the basis of one or more agreements used by one company, these agreements are used more widely in an economy. If similar agreements or issues within agreements are not in wider use, an Application for Decision may be the more appropriate process.

166. The draft Applications Guideline has been amended to make clear that it is the category of agreements which are the subject of a Block Exemption Order that should be representative of the category of agreements in wider use across an industry or industries (see paragraph 5.3 of the revised Applications Guideline).

167. The Commission has also made some amendments to clarify when it may be appropriate to make a sector-specific Block Exemption Application. New text in the revised Applications Guideline is provided to clarify that applicants seeking a sector specific Block Exemption Order are expected to show evidence of a greater need for cooperation between undertakings in the relevant sector as compared with other sectors in the economy.

168. Any parties in doubt about the appropriate path are encouraged to seek an initial consultation meeting as described in the draft Applications Guideline.

Forms relating to Applications for Decisions and Block Exemption Orders

169. A small number of parties requested that the Commission consult on any forms referred to in its draft Applications Guideline. The Guideline already contains the substantive checklist of information that will be required and the process by which the Commission will liaise with parties and seek further information if required. The Commission will not be rejecting applications on the basis of technicalities, but will work with parties who make a genuine effort to complete the Application to ensure it is complete. The forms will simply structure the key information to be provided, how it should be provided and the relevant fee payable for the specific application.

170. The Commission has decided not to use a form for Applications for Block Exemption Orders and has accordingly removed references to Form BE in the revised Applications Guideline.

Consulting on a draft Decision

171. Certain submissions queried the Commission's position that it would not automatically consult on a draft Decision, in contrast to a draft Block Exemption Order. The consultation with respect to the latter is required by the Ordinance and reflects the likely broader impact of issuing a Block Exemption Order. However, there are some cases where the Commission may well benefit from consulting third parties on a draft proposed Decision. The Commission has amended the draft Applications Guideline to reflect when it is likely to consult on a draft proposed Decision (see paragraph 8.10 of the revised Applications Guideline).

Indicative timeframes for the Commission's Applications processes

172. A very large number of submissions requested that the Commission place timeframes on its processes for making Decisions or issuing Block Exemption Orders. The Commission has not done so.

173. While the Commission will endeavour to work efficiently and keep parties up to date on the progress of its assessment, the timeframe for making a Decision or Block Exemption Order will vary markedly depending on factors such as the complexity of the issues raised, the number of parties who have an interest in the decision and who also need to be consulted, and the resources available to be devoted to the review.

174. The Commission will monitor on the time taken to review Applications and always seek to streamline its processes to ensure they are efficient.

Providing reasons

175. A number of submissions requested that the Commission provide reasons for its decisions or Block Exemption Orders. The Commission intends to do so and has made minor amendments to the Guideline to expressly state that the communication of these outcomes will incorporate the Commission's reasons.